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No. 95-5257

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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The government, in its brief, has acknowledged the conflict among the circuits in the proper standard of review for determination of probable cause and reasonable suspicion. Respondent's brief, p. 9. Moreover, the government agreed with the Petitioners' position that, a district court's conclusion that certain facts amount probable cause, is subject to de novo review, Respondent's brief, p. 11. The government concludes that the disparate circuit courts' standards may merit this court's review in an appropriate case. However, in the opinion of the respondent, the case at bar, should not be granted certiorari because the suppression result would remain unaffected despite which standard

was applied. The petitioners maintain, conversely, that a de novo review on appeal, would have resulted in a different outcome. The fact situation, as previously outlined in petitioners' pleadings, demonstrate that the decision by the court of appeals, in affirming the trial court's ruling, was not a heartfelt endorsement, (Emphasis added). Rather, the Court of Appeals noted:

> "Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop." United States v. Ornelas, 16 F3d 714, 719 (7th Cir, 1994).

The court further advised; "Clearly, were it not for the NADDIS hit, the officers would not have had grounds for reasonable suspicion that the defendants were drug dealers, Ornelas, supra, p. 716.

The government opines that "there was ample corroboration of the NADDIS hit -- the age and make of the car, its "source" state license and the late hour of the unreserved motel check-in ..." Respondent's brief, p. 14. The Court of Appeals could not have more pointedly disagreed. Chief Judge Posner wrote the following in consideration of the component parts claimed by the government to support the drug courier profile;

> "Not only is every circumstance on which the officers relied other than the hits innocent taken by itself -- many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door General Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations -- but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disporportionately concentrated in California, and having

on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then -- often at very odd hours -- to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police." Ornelas, supra, p. 717.

The court further noted,

"So we must ask what the NADDIS hits added to a 'drug courier profile' that seems only a little better than a dragnet for Hispanics". Ornelas, supra, p. 717.

The facts at bar did present a "close question" for the appellate tribunal. Had the court conducted a de novo review instead of applying the clearly erroneous and deferential standard, the lower finding of probable cause would not have been affirmed. Accordingly, petitioners request that this court grant certiorari. Alternatively, it is requested that this court remand the matter to the Seventh Circuit in order that a panel conduct a de novo review, (see Williams v. United States, 500 U.S. 901 (1991).

Petitioners and the government agree that the appropriate standard of review in non-warrant cases is de novo. Because the Seventh Circuit and a number of other jurisdictions use the more deferential clearly erroneous standard, thousands of cases are

arguably decided by the wrong standard. This affects, not only criminal defendants, but also government appellants. The court should put an end to such disparate practice by articulating a uniform standard of review.

Respectfully submitted this 18th day of October, 1995.

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October 18, 1995

CLERK OF COURT FOR THE
UNITED STATES SUPREME COURT
ONE FIRST STREET NE
WASHINGTON, DC 20543

Re: Ismael Ornelas-Ledesma and Saul Ornelas, Petitioners v. United States of America, Case No. 95-5257

Dear Clerk:

Please find enclosed, original and 10 copies of the Petitioners' Reply Brief and Affidavit of Service in the above entitled matter.

By copy of this letter, same is being served upon the offices of Drew S. Days, III, Solicitor General.

Very truly yours,

STYLER, KOSTICH, LeBELL,
DOBROSKI & McGUIRE

Robert G. LeBell
State Bar No. 01015710

RGL:eas
Encl.

cc: Drew S. Days, III, Solicitor General
(w/encl.)

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COUNTY OF MILWAUKEE)

AFFIDAVIT OF SERVICE

I, Eve A. Schneider, hereby state that on the 18th day of October, 1995, in the case entitled Ismael Ornelas-Ledesma and Saul Ornelas, Petitioners v. United States of America, Case No. 95-5257, that I personally handed an original and 13 copies of the Petitioners' Reply Brief, to a Federal Express messenger to be delivered to the following:

1 original and 10 copies:
CLERK OF COURT FOR THE
UNITED STATES SUPREME COURT
ONE FIRST STREET NE
WASHINGTON, DC 20543

3 copies:
DREW S. DAYS, III
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
10TH ST AND CONSTITUTION AVE NW
WASHINGTON, DC 20530

Eve A. Schneider

Subscribed and sworn to before me
this 18th day of October, 1995.

Notary Public, Milwaukee, Wisconsin
My commission expires: 1/26/97

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